

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In The Matter of)

Annual Assessment of the Status of)
Competition in the Market for the)
Delivery of Video Programming)

CS Docket No. 96-133

To: The Commission)

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**REPLY COMMENTS
OF
THE NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE**

Pursuant to Section 1.430 of the Rules and Regulations of the Federal Communications Commission ("FCC" or "Commission"), the National Rural Telecommunications Cooperative ("NRTC"), by its attorneys, hereby files these Reply Comments concerning the state of competition in the market for delivery of video programming.¹

I. BACKGROUND

1. NRTC filed Comments in this proceeding on July 19, 1996. NRTC appreciates this opportunity to reiterate its belief that there will not be full and

¹ Notice of Inquiry ("Notice"), 61 Fed. Reg. 34409 (released July 2, 1996).

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effective competition in the market for delivery of video programming until Congress amends the Copyright Act to allow satellite retransmission of network signals for private home viewing within the Grade B contour of a network affiliate station. As NRTC indicated in its Comments, the Copyright Act restriction against retransmission of network signals in these defined areas serves as an artificial barrier to full realization of the competitive potential offered by Direct Broadcast Satellite ("DBS") technology. Thus, absent an amendment of the Copyright Act, DBS operators will continue to be artificially restricted from providing local network programming, and will remain at a distinct disadvantage in the video programming marketplace.

2. Additionally, in order to foster competition, NRTC reemphasizes its view that the Commission should prohibit cable operators from obtaining DBS licenses either directly or through their affiliates. Although other participants in this proceeding failed to address this important issue in their comments, NRTC urges the Commission to reconsider the Commission's original proposal in the DBS auction proceeding, IB Docket No. 95-168, PP Docket No. 93-253,² and to adopt cable-DBS cross-ownership restrictions. The stranglehold which cable operators maintain over the video programming and distribution market is exacerbated by exclusive arrangements between vertically-integrated programmers and non-cable operator distributors in areas unserved by cable. NRTC requests the Commission to forbid such exclusive arrangements. Furthermore, the Commission's rules should provide

² Notice of Proposed Rule Making ("Notice"), 60 Fed. Reg. 55822 (November 3, 1995) at ¶ 40.

for the recovery of damages -- at a minimum a refund of demonstrated overpayments -- to those distributors clearly and demonstrably injured due to Program Access rule violations. Without such a provision, the Program Access rules lack the enforcement mechanism necessary to be effective.

3. Finally, the preemption of local zoning regulation and non-governmental restrictions against DBS antennas should be extended to include renters and other residents who do not exclusively control their residences.

II. REPLY COMMENTS

A. The Commission Should Seek an Amendment of the Copyright Act.

4. All Direct-to-Home ("DTH") satellite services retransmit superstation and network signals to subscribers pursuant to the statutory copyright license, 17 U.S.C. § 119. Under the Copyright Act, however, only unserved households in "white areas" are eligible to receive network signals by satellite. *Id.* Thus, the Copyright Act presently prohibits the retransmission by satellite of network signals for private home viewing unless the household is "unserved." Only households that have not, within 90 days of subscribing to receive satellite signals, subscribed to a cable system that provides the signal of a primary network station affiliated with that network, and that cannot receive a Grade B signal of the primary network station affiliated with that network, are eligible to receive service. 17 U.S.C. § 119(d)(10).

5. This Copyright Act restriction creates an artificial barrier by preventing consumers in many areas of the country from realizing the full benefits of DBS

technology.³ Although DBS technology is fully capable of providing *all* consumers with network affiliate programming, the Copyright Act artificially restricts DBS providers from offering such network programming to millions of potential DBS subscribers. Despite the plethora of new channels in the video programming marketplace, network programming remains the most vital segment of programming for many consumers. Thus, the inability to offer network programming serves as perhaps the most serious impediment to competition from DBS providers in the video programming marketplace. When faced with the decision of obtaining DBS or cable, many consumers may choose cable simply because it offers them network programming which DBS cannot, by law, provide. NRTC urges the Commission to request Congress to level the competitive playing field by eliminating this anticompetitive restriction from the Copyright Act.

B. Competition to Cable is Lacking.

6. Access to programming is the cornerstone of competition in the video programming marketplace. Without access to programming, non-cable MVPDs simply cannot compete against large cable operators. According to Time Warner Cable ("TWC"), however, cable operators currently face considerable competition

³ MCI and News Corp. have recently requested the Copyright Office to permit them to combine local television signals and DBS into a single package in order to compete with cable. Multichannel News, August 12, 1996 at 10.

from both DBS and C-band services. TWC at 19. Moreover, TWC asserts that not only does competition exist, it is "thriving." TWC at 19.

7. NRTC strongly disagrees with TWC's rosy characterization of the state of affairs in the video programming marketplace. Far from "thriving," competition to cable operators is sorely lacking. As NRTC pointed out in its Comments, the DBS industry currently serves only about 2% of U.S. homes.⁴ The most important factor causing this dearth of competition to cable is the inability of NRTC and other non-cable MVPDs to obtain programming on fair terms and conditions. NRTC agrees with the participants in this proceeding who stated in their comments that competition will be lacking so long as cable programmers can impose rates for distribution of programming that are higher than those charged by the programmers themselves to cable and other distribution technologies.

8. For example, both SBC Communications ("SBC") and OpTel stated that the current Program Access regulations significantly impede competitive entry. SBC at 6, OpTel at 10. See, also, RCN at 4. Until the Commission exercises its authority under the Cable Consumer Protection and Competition Act of 1992 ("1992 Cable Act") to order appropriate remedies for Program Access violations, cable will retain its unfair competitive advantage. Allowing distributors who are injured by Program Access violations to recover damages -- a remedy currently lacking in the

⁴ Via Satellite, Open Architecture DBS and the Era of Customized Television, June 1996, at 44.

Commission's regulations -- would strengthen the Program Access rules and promote fairness and competition.

9. As NRTC noted in its Comments, the 1992 Cable Act broadly directed the Commission to establish rules to prohibit exclusive arrangements which prevent MVPDs from obtaining programming from vertically-integrated programmers for distribution to persons in areas not served by cable. 47 U.S.C. 548(c)(2)(C). The Commission's implementing rule, however, failed to prohibit exclusive arrangements between vertically-integrated cable programmers and non-cable operator distributors.⁵ Because the Commission's rules failed to fully implement the Congressional ban against exclusive arrangements by vertically-integrated programmers in areas unserved by cable, NRTC is unable to obtain access to critical programming for distribution via DBS. This roadblock to competition is exacerbated by the fact that much of the programming which viewers desire is controlled by a few cable conglomerates. For example, as NRTC noted in its Comments, Time Warner and TCI serve approximately 40% of the entire cable market. NRTC reiterates its belief that unless and until the Commission prohibits exclusive arrangements between vertically-integrated cable programmers and non-cable operators in areas unserved by cable, the Commission should not expect to see new significant competition to cable in the video programming marketplace.

⁵ 47 C.F.R. 76.1002(c)(1).

C. Cable-DBS Cross-Ownership Restrictions are Necessary.

10. As stated in its Comments, NRTC urges the Commission to prohibit cross-ownership between cable affiliates and DBS operators. In its Notice of Proposed Rule Making ("Notice") in IB Docket No. 95-168, PP Docket No. 93-253, the Commission explained its belief that cable-affiliated entities have an incentive to minimize competition from any DBS resources they control. Notice at ¶ 40. Thus, the Commission stated, such cable entities would coordinate their joint activities to maximize their combined profits. Notice at ¶¶ 37, 40. Therefore, the Commission proposed restrictions on ownership of DBS by cable affiliates. Notice at ¶ 34. The Commission's Order, however, did not adopt these restrictions because the Commission believed that the limited number of orbital slots would prevent cable entities from impeding DBS as a competitive service to cable. Report and Order in IB Docket No. 95-168, PP Docket No. 93-253 (December 15, 1995) at ¶¶ 104, 105.

11. In light of the fact that competition to cable has not increased in any meaningful measure during the past six months since this decision, NRTC urges the Commission to reconsider its determination not to adopt a cable-DBS cross-ownership rule. The recent Telquest debacle, in which cable-affiliates tried to provide DBS via a Canadian orbital slot, exemplifies the importance of this issue. NRTC believes the Commission should act proactively to prevent any attempt by cable entities to eclipse the nascent competition posed by DBS providers simply by obtaining the few available DBS licenses.

12. A cross-ownership restriction also would be consistent with the recent proposal put forth by the Commission in its Report and Order and Further Notice of Proposed Rule Making in the Local Multipoint Distribution Service ("LMDS") proceeding, CC Docket No. 92-297. There, the Commission proposed cross-ownership restrictions on cable operators seeking LMDS licenses. Recognizing the potential anticompetitive effects of cable companies that operate in nascent video programming industries, the Commission specifically proposed to restrict cable companies from obtaining LMDS licenses. The Commission should impose such restrictions on cable-DBS cross-ownership.

D. The Commission Should Extend its Preemption Policy.

13. In IB Docket No. 95-59, the Commission adopted a preemption policy that generally prevents governmental and nongovernmental restrictions against DBS antennas. NRTC strongly supports this decision as a giant step toward elimination of parochial obstacles to competition in the video programming marketplace. NRTC shares the view put forth by the Satellite Broadcasting and Communications Association ("SBCA") that the Commission's efforts to preempt governmental and nongovernmental restrictions on antennas should enhance competition. SBCA at 18-19. While NRTC believes that the Commission's decision to preempt most governmental and nongovernmental restrictions on DBS antennas will enhance competition, more needs to be done. Specifically, NRTC urges the Commission to adopt its tentative proposal to extend this new preemption policy to protect viewers

who are either renters or who commonly own property upon which the DBS antenna would be placed.

14. Section 207 directs the FCC to "prohibit restrictions that impair a viewer's ability" to receive video programming. 17 U.S.C. § 207. The Report and Order adopts a rule prohibiting restrictions that impair a viewer's ability to receive signals when the viewer has a direct or indirect ownership interest in the property being restricted. 47 C.F.R. § 1.4000. Unless the FCC broadens its preemptive policy to assure renters and common owners the same protection given to full-fledged home or property owners, these individuals will be subject to the very types of impairments the statute attempts to prohibit. Congress did not intend to penalize those viewers who do not happen to be private homeowners. The Commission should use its authority to extend its preemption policy to offer protection to all viewers, whether property owners or not.

III. CONCLUSION

15. At present, DBS providers such as NRTC are like minnows in a shark tank: they can swim, but they lack the ability to compete head-to-head with cable operators. The Commission should promote competition in the video programming marketplace by asking Congress to eliminate the Copyright Act provision that prevents DBS operators from offering the fruits of their technology to consumers everywhere. Likewise, the Commission should give DBS companies some "bite" by allowing them to recover damages for Program Access violations and by forbidding exclusive arrangements between vertically-integrated cable entities and non-cable

operators in areas unserved by cable. Equally as important, NRTC requests the Commission to adopt cross-ownership restrictions so that cable giants do not swallow up DBS as a competitive force. Finally, NRTC applauds the Commission for adopting its preemption rules, but requests that these rules be extended to protect the viewing rights of all Americans, not just those who are fortunate enough to own their own property.

WHEREFORE, THE PREMISES CONSIDERED, the National Rural Telecommunications Cooperative urges the Commission to consider these Reply Comments as part of its Annual Report to Congress as the Status of Competition in the Market for the Delivery of Video Programming, and to revise its rules in accordance with the views expressed herein.

Respectfully submitted,

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